

I-35. 970.5204-31 INSURANCE--LITIGATION AND CLAIMS (JUN 1997)

- (a) The Contractor may, with the prior written authorization of the contracting officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The Contractor shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.
- (b) The Contractor shall give the Contracting Officer immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract. Except as otherwise directed by the contracting officer, in writing, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action. The Contractor, with the prior written authorization of the Contracting Officer, shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.
- (c)
 - (1) Except as provided in paragraph (c)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.
 - (2) The Contractor may, with the approval of the contracting officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.
 - (3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.
- (d) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.
- (e) Except as provided in subparagraphs (g) and (h) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed--

- (1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and
 - (2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, Obligation of Funds (48 CFR) (DEAR 970.5204-15).
- (f) The Government's liability under paragraph (e) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.
- (g) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)--
 - (1) Which are otherwise unallowable by law or the provisions of this contract; or
 - (2) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer.
- (h) In addition to the cost reimbursement limitations contained in DEAR 970.3101-3, and notwithstanding any other provision of this contract, the Contractor's liabilities to third persons, including employees but excluding costs incidental to workers' compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by Contractor managerial personnel's
 - (1) Willful misconduct,
 - (2) Lack of good faith, or
 - (3) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.
- (i) The burden of proof shall be upon the Contractor to establish that costs covered by paragraph (h) of this clause are allowable and reasonable if, after an initial

review of the facts, the contracting officer challenges a specific cost or informs the Contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by Contractor managerial personnel.

- (j)
 - (1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the Contractor so as to be separately identifiable. If the contracting officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.
 - (2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the contracting officer.
 - (3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referred to in paragraph (g)(1) of this clause is not allowable.
 - (4) The term Contractor's Managerial Personnel is defined in clause paragraph (j) of 48 CFR (DEAR) 970.5204-21.
- (k) The Contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the Contractor for any unallowable or nonreimbursable costs incurred in connection with contract performance.
 - (l) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall--
 - (i) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;
 - (ii) Authorize Department representatives to collaborate with: in-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and
 - (iii) Authorize Department representatives to settle the claim or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not

insured or covered by bond. In any action against more than one Department Contractor, the Department may require the Contractor to be represented by common counsel. Counsel for the Contractor may, at the Contractor's own expense, be associated with the Department representatives in any such claim or litigation.

I-36. 970.5204-35 CONTROLS IN THE NATIONAL INTEREST (JUL 1994)

The Contractor agrees to comply with the requirements of DOE 1240.2 (See current version), Unclassified Visits and Assignments by Foreign Nationals, and to such other DOE requirements of the same general nature as the parties may agree to from time to time; these requirements relate to unclassified work, and they shall not be construed to limit or affect in any way the Contractor's obligation to conform to all security regulations and requirements of DOE pertaining to classified work

I-37. 970.5204-38 GOVERNMENT FACILITY SUBCONTRACT APPROVAL (APR 1994)

Upon request of the Contracting Officer and acceptance thereof by the Contractor, the Contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the Contracting Officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

I-38. 970.5204-39 ACQUISITION AND USE OF ENVIRONMENTALLY PREFERABLE PRODUCTS AND SERVICES (OCT 1995)

- (a) In the performance of this contract, the Contractor shall comply with the requirements of the following issuances:
 - (1) Executive Order 12873 of October 20, 1993, entitled "Federal Acquisition, Recycling, and Waste Prevention,"
 - (2) Section 6002 of Resources Conservation and Recovery Act (RCRA) of 1976, as amended (42 U.S.C. 6962, Pub. L. 94-580, 90 Stat. 2822),
 - (3) Title 40 of the Code of Federal Regulations, Subchapter I, part 247 (Comprehensive Guidelines for the Procurement of Products Containing Recovered Materials) and such other Subchapter I Parts or Comprehensive Procurement Guidelines as the Environmental Protection Agency may issue from time to time as guidelines for procurement of products that contain recovered/recycled materials,

- (4) "U.S. Department of Energy Affirmative Procurement Program for Products Containing Recovered Materials" and related guidance document(s), as they are identified in writing by the Department.
- (b) The Contractor shall prepare and submit reports on matters related to the use of environmentally preferable products and services from time to time in accordance with written direction (e.g., in a specified format) from the Contracting Officer.
- (c) In complying with the requirements of paragraph (a) of this clause, the Contractor shall coordinate its concerns and seek implementing guidance on Federal and Departmental policy, plans, and program guidance with the DOE recycling point of contact, who shall be identified by the Contracting Officer. Reports required pursuant to paragraph (b) of this clause, shall be submitted through the DOE recycling point of contact.

I-39. 970.5204-43 OTHER GOVERNMENT CONTRACTORS (APR 1994)

The Government may undertake or award other contracts for additional work or services. The Contractor agrees to fully cooperate with such other Contractors and Government employees and carefully fit its own work to such other work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other Contractor or by Government employees.

I-40. 970.5204-44 FLOWDOWN OF CONTRACT REQUIREMENTS TO SUBCONTRACTS (FEB 1997) [As revised on 7/30/97]

- (a) The Contractor shall include the clauses in paragraph (b) of this clause in appropriate subcontracts.
 - (1) To the extent that the clause is included in this prime contract, the Contractor shall comply with that portion of the clause that directs application to subcontracts.
 - (2) To the extent that the clause is not included in this prime contract, or where it is included but there is no instruction for treatment in subcontracts, the Contractor shall include the clause in accordance with applicable regulatory guidance which would apply if the subcontract were a prime contract with the Federal Government.
 - (3) In all cases, where a regulation is cited, the Contractor shall comply with the regulation in administration of the related clause.
- (b) *Clauses and Related Regulations.*

- (1) *Air Transportation by U.S.-Flag Carriers.* Clause at FAR 52.247-63.
- (2) *Anti-Kickback Act of 1986.* Clause at FAR 52.203-7.
- (3) *Clean Air and Water.* Clause at FAR 52.223-2, and follow the requirements of FAR 23.1.
- (4) *Contract Work Hours and Safety Standards Act.* Clause at FAR 52.222-4, and follow the requirements of FAR 22.3.
- (5) *Cost or Pricing Data.* (5) Cost or Pricing Data. Clauses prescribed at 48 CFR (DEAR) 970.1508-1, and appropriate contract provisions similar to those set forth at 48 CFR 52.215-22 and 48 CFR 52.215-23, that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.
- (6) *Cost and Schedule Control Systems.* Clause at 48 CFR (DEAR) 970.5204-50.
- (7) *Cost Accounting Standards.* Clause at FAR 52.230-2, as prescribed in 48 CFR (DEAR) 970.30.
- (8) *Davis-Bacon Act.* Clauses as directed at FAR 22.407, and follow the requirements of FAR 22.4 to the same extent that they would apply if the subcontract had been directly awarded by DOE. 48 CFR (DEAR) Subpart 922.4 and 48 CFR (DEAR) 970.2273 provide guidance to assist in determining the applicability of these regulations.
- (9) *Employment of the Handicapped.* Clause at FAR 52.222-36, and follow the requirements of FAR 22.14.
- (10) *Environmental and Occupational Safety and Health.* Clauses as prescribed in 48 CFR (DEAR) 970.2303-2.
- (11) *Equal Employment Opportunity.* Clauses as prescribed in FAR 22.810, as applicable, and follow the requirements of FAR 22.8, 48 CFR (DEAR) 922.8, E.O. 11246 and 41 CFR Part 60.
- (12) RESERVED
- (13) *Foreign Travel.* Clause at 48 CFR (DEAR) 970.5204-52.
- (14) *Nuclear Hazards Indemnity.* Clause at 48 CFR (DEAR) 970.2870.

- (15) *Organizational Conflicts of Interest.* Clause at 48 CFR (DEAR) 952.209-72 in accordance with 48 CFR (DEAR) 970.0905.
- (16) *Patent, Data and Copyrights.* Appropriate clauses as required by 48 CFR (DEAR) Parts 927 and 970.
- (17) *Printing.* Clause at 48 CFR (DEAR) 970.5204-19.
- (18) *Privacy Act.* Clauses at FAR 52.224-1 and FAR 52.224-2, and follow the requirements of FAR 24.1.
- (19) *Accounts, Records, and Inspections.* Clause at 48 CFR (DEAR) 970.5204-9.
- (20) *Safeguarding Classified Information.* Appropriate clauses as prescribed at 48 CFR (DEAR) 970.0404.
- (21) *Service Contract Act.* Clauses at FAR 52.222-40 and FAR 52.222-41.
- (22) *Small Business and Small Disadvantaged Business Concerns.* Clause at FAR 52.219-9.
- (23) *Special Disabled and Vietnam Era Veterans.* Clause at FAR 52.222-35, and follow the requirements of FAR Subpart 22.13.
- (24) *Taxes.* Clause similar to 48 CFR (DEAR) 970.5204-23 cost-reimbursement. An appropriate tax clause covering tax matters should also be included in fixed-price subcontracts.
- (25) *Termination.* Appropriate clause or clauses as set forth at FAR 52.249-1 through 52.249-14.
- (c) *Other.* Omission from the foregoing list of contract flowdown provisions shall not be construed as waiving a requirement for the Contractor to comply with a flowdown requirement for subcontracts appearing elsewhere in this contract.

I-41. 970.5204-45 TERMINATION (OCT 1995)

- (a) This contract shall continue until September 30, 2003, unless sooner terminated in accordance with the provisions which follow:
 - (1) The performance of work under this contract may be terminated by the Government in whole, or from time to time in part,

- (i) whenever the Contractor shall default in performance, and shall fail to cure the fault or failure within such period as the Contracting Officer may allow after receipt from the Contracting Officer of a notice specifying the fault or failure, or
 - (ii) whenever, for any reason, the Contracting Officer shall determine any such termination is for the best interest of the Government. Termination of the work hereunder shall be effected by delivery of a notice of termination specifying whether termination is for default of the Contractor or for the convenience of the Government, the extent to which performance of work under the contract shall be terminated, and the date upon which such termination shall become effective. Any such termination shall be without prejudice to any claim which either party may have against the other. If, after notice of termination under the provisions of paragraph (a)(1)(i) of this section, it is determined for any reason that the contractor was not in default, such notice of default shall be deemed to have been issued pursuant to paragraph (a)(1)(ii) of this section, and the rights and obligations of the parties hereto shall in such event be governed accordingly.
 - (2) Upon receipt of notice of termination, in accordance with (1) above, the Contractor shall, to the extent directed in writing by the Contracting Officer, discontinue the terminated work and the placing of orders for materials, facilities, supplies, and services in connection therewith, and shall proceed, if, and to the extent required by the contracting officer, to cancel promptly and settle with the approval of the contracting officer, existing orders, subcontracts, and commitments insofar as such orders, subcontracts, and commitments pertain to this contract.
- (b) Upon the termination of this contract, full and complete settlement of all claims of the Contractor and of DOE arising out of this contract shall be made as follows:
- (1) The Government shall have the right in its discretion to assume sole responsibility for any or all obligations, commitments, and claims that the Contractor may have undertaken or incurred, the cost of which are allowable in accordance with the provisions of this contract; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and; take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government any rights and benefits the Contractor may have under or in connection with such obligations, commitments, or claims.

- (2) The Government shall treat as allowable costs all expenditures made in accordance with and allowable under the clause entitled "Allowable Costs and Fixed Fee," not previously so allowed or otherwise credited for work performed prior to the effective date of termination, together with expenditures as may be incurred for a reasonable time thereafter with the approval of, or as directed by, the Contracting Officer.
- (3) The Government shall treat as allowable costs, to the extent not included in paragraph(b)(2)of this section, the costs of settling and paying claims arising out of the termination of work under orders, subcontracts, and commitments as provided in paragraph (a)(2) of this section.
- (4) The Government shall treat as allowable costs the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the termination of the contract and for the termination and settlement of orders and subcontracts thereunder, together with such further expenditures made by the Contractor after the date of termination for the protection or disposition of Government property as are approved or required by the Contracting Officer; provided, however, that if the termination is for default of the Contractor, there shall not be included any amount for preparation of the Contractor's settlement proposal.
- (5) If performance of work under this contract is terminated in whole by the Government, the fixed fee of the Contractor shall be prorated to and including the effective date of such termination. In addition, if the termination is for the convenience of the Government, the Contractor shall be paid a fixed fee in an amount to be agreed upon as compensation for its services in closing out the work under this contract after the effective date of such termination. The additional fixed fee is to be negotiated as soon as practicable after service of notice of termination, shall take into account the estimate of the cost of the services and managerial effort to be rendered under this clause after the effective date of termination, and shall be provided for in a supplement or amendment to this contract prior to final settlement hereunder. Pending agreement as to the amount of such fee, the Contractor shall diligently proceed with the performance of the services required under this clause. No additional fee will be paid if the contract is terminated due to the default of the Contractor. In the event of a partial termination by the Government, an equitable adjustment shall be made in the fixed fee if such termination results in a material decrease in the level of the Contractor's management effort. Any failure to agree on the right to or the amount of any adjustment shall be deemed a dispute within the purview of the clause hereof entitled "Disputes."

- (6) The obligation of the Government to make any of the payments required by this clause or any other provisions of this contract shall be subject to any unsettled claims in connection with this contract which the Government may have against the Contractor.
- (c) Prior to final settlement, the Contractor shall furnish a release as required in the clause entitled "Payments and Advances" and account for Government-owned property as may be required by the Contracting Officer: provided, however, that unless the Contracting Officer requires an inventory, the maintenance and disposition of the records of Government-owned property in accordance with the clause entitled "Accounts, Records and Inspection" shall be accepted by the Contracting Officer as full compliance with all requirements of this contract pertaining to an accounting for such property.

I-42. 970.5204-54 BASIC FEE AND AWARD FEE (APR 1994)

- (a) *Basic Fee and Award Fee.* It is herewith agreed that a basic fee and an award fee, to be determined in accordance with the provisions of this clause, are available for payment in accordance with the clause of this contract entitled Payments and Advances.
- (b) *Fee Negotiations.* Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon, the Contracting Officer and Contractor shall enter into negotiation of a basic and award fee. This contract shall be modified at the conclusion of each negotiation to reflect the negotiated amount for the basic fee and to identify the available award fee amount. It is herein agreed the award fee amount shall be assigned to evaluation periods six months in duration. If the parties are unable to agree on a reasonable fee, the Contracting Officer shall unilaterally determine the basic fee and the available award fee, subject to the clause of this contract entitled disputes.
- (c) *Determination of Award Fee Earned.*
 - (1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance for a determination of award fee earned.
 - (2) For this contract, the Government Fee Determination Official (FDO) will be (insert title of FDO). The Contractor agrees that the determination as to the amount of award fee earned will be made by the Government FDO and such determination is binding on both parties and shall not be subject to appeal under the "Disputes" clause or any other appeal clause.

- (3) The evaluation of Contractor performance shall be in accordance with the Performance Evaluation Plan described in subparagraph (d), below. The Contractor shall be promptly advised in writing of the determination, and the reasons why the award fee was or was not earned. While it is recognized that the basis for determination of the fee shall be the evaluation by the Government, in accordance with the Performance Evaluation Plan, the FDO may also consider any information available to him or her which relates to the Contractor's performance of contract requirements. In the event that the Contractor's performance is considered unacceptable in any area of contract performance which is specified in the Performance Evaluation Plan, even if no weight or fee is specifically assigned to the particular performance area, the FDO may at his/her discretion determine the Contractor's overall performance to be unacceptable, and accordingly may withhold the entire award fee for the evaluation period.
- (4) An award fee cycle usually consists of two six-month award fee periods in a single fiscal year. Unearned award fee may be carried over within a single fiscal year, or other two-period fee negotiation cycle, as may have been agreed upon. The FDO may, at his/her sole discretion, specify in a fee determination that award fee not earned during the first evaluation period of a two-period fee cycle may be allocated to the second fee period in that fee cycle. The Contractor shall not, however, be entitled to earn any of this "carry-over" fee if its overall performance in the latter evaluation period does not reflect an improvement over the prior evaluation period. Overall performance evaluations in the second period which are equal to or the same as those in the first period shall not be considered as improvements providing entitlement to the carry-over portion of the award fee pool. If the single negotiation of a basic and the resulting award fee amount (fee cycle) will be for more than two evaluation periods, unearned award fees in anyone of the evaluation periods established by that negotiation may be carried over only to the next period covered by that negotiation. Fees unearned under one fee cycle may not be carried forward to another fee cycle.

(d) *Performance Evaluation Plan.*

- (1) The Government shall establish unilaterally a Performance Evaluation Plan upon which the determination of the amount of award fee earned shall be based. Such Plan shall include the criteria to be considered under each area evaluated and the percentage of award fee available for each area. A copy of the Plan shall be provided to the Contractor thirty (30) calendar days prior to the start of an evaluation period.

- (2) The Performance Evaluation Plan will set forth the criteria upon which the Contractor will be evaluated for performance relating to any technical, schedule, management, and/or cost objectives selected for evaluation.
 - (3) The Performance Evaluation Plan may, consistent with the contract statement of work, be revised unilaterally by the Government at any time during the period of performance. Notification of such changes shall be provided to the Contractor at least thirty (30) calendar days prior to the start of the evaluation period to which the change will apply.
- (e) *Contractor Self-Assessment.* Following each evaluation period, the Contractor shall submit a self-assessment within (Insert Number) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The FDO will review the Contractor's self-assessment as part of his/her evaluation of the Contractor's management during the period. An unrealistic self-assessment will result in lower award fee determinations. The Contractor will not be penalized for a realistic self-assessment, although deficiencies noted by the Contractor may be reflected in the Government's evaluation. The self-assessment itself will not be the basis for the award fee determination.
- (f) *Schedule for Award Determinations.* The FDO shall issue the final award fee determination in accordance with a schedule set forth in the Performance Evaluation Plan. However, a determination must be made within sixty (60) calendar days after the receipt by the Contracting Officer of the contractor's self-assessment discussed in paragraph (e), above. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined award fee amount at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the "Renegotiation Board Interest Rate," and is published in the Federal Register semiannually on or about January 1 and July 1. The interest on any late award fee determination amount will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of award fee and be subject to interest if not paid in the succeeding 30-day period.

I-43. 970.5204-58 WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (AUG 1992)

- (a) *Program Implementation.* The Contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.
- (b) *Remedies.* In addition to any other remedies available to the Government, the Contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the Contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.
- (c) *Subcontracts.*
 - (1) The Contractor agrees to notify the Contracting Officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the Contractor believes may be subject to the requirements of 10 CFR part 707.
 - (2) The DOE prime Contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE prime Contractor shall review and approve each Subcontractor's program, and shall periodically monitor each Subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.
 - (3) The Contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

I-44. 970.5204-59 WHISTLE-BLOWER PROTECTION FOR CONTRACTOR EMPLOYEE (JAN 1993)

- (a) The Contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 CFR part 708 with respect to work performed on-site at a DOE-owned or -leased facility, as provided for at part 708.
- (b) The Contractor shall insert or have inserted the substance of this clause including this paragraph (b), in subcontracts, at all tiers, with respect to work performed on-site at DOE owned or leased facilities, as provided for at 10 CFR part 708.

I-45. 970.5204-60 FACILITIES MANAGEMENT (NOV 1997)

- (a) *Site Development Planning.* The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract. Based upon this guidance, the contractor shall prepare, and maintain through annual updates, a Long-Range Site Development Plan (Plan) to reflect those actions necessary to keep the development of these facilities current with the needs of the Government and allow the contractor to successfully accomplish the work required under this contract. In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall use the Plan to manage and control the development of facilities and lands. All plans and revisions shall be approved by the Government.
- (b) *General Design Criteria.* The general design criteria which shall be utilized by the contractor in managing the site for which it is responsible under this contract are those specified in the applicable DOE Directives in the 6430, Design Criteria, series listed elsewhere in this contract. The contractor shall comply with these mandatory, minimally acceptable requirements for all facility designs with regard to any building acquisition, new facility, facility addition or alteration or facility lease undertaken as part of the site development activities of paragraph (a) above. This includes on-site constructed buildings, pre-engineered buildings, plan-fabricated modular buildings, and temporary facilities. For existing facilities, original design criteria apply to the structure in general; however, additions or modifications shall comply with this directive and the associated latest editions of the references therein. An exception may be granted for off-site office space being leased by the contractor on a temporary basis.
- (c) *Energy Management.* The contractor shall manage the facilities for which it is responsible under the terms and conditions of this contract in an energy efficient manner in accordance with the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall develop a 10-year energy management plan for each site with annual reviews and revisions. The contractor shall submit an annual report on progress toward achieving the goals of the 10-year plan for each individual site, and an energy conservation analysis report for each new building or building addition project. Any acquisition of utility services by the contractor shall be conducted in accordance with 48 CFR 970.41.
- (d) *Subcontract requirements.* To the extent the contractor subcontractors performance of any of the responsibilities discussed in this clause, the subcontractor shall contain the requirements of this clause relative to the subcontracted responsibilities.

**I-46. 970.5204-61 COST PROHIBITIONS RELATED TO LEGAL AND OTHER PROCEEDINGS
(JUN 1997)**

(a) *Definitions.*

Conviction, as used in this section, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a conviction due to a plea of *nolo contendere*.

Costs, include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the Contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers and directors; and any similar costs incurred before, during, and after commencement of a proceeding which bears a direct relationship to the proceeding.

Fraud, as used herein, means

- (1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,
- (2) Acts which constitute a cause for debarment or suspension under FAR 9.406-(2)(a) and FAR 9.407-(2)(a), and
- (3) Acts which violate the False Claims Act, 31 U.S.C. 3729-3731, or the Anti-kickback Act, 41 U.S.C. 51 and 54.

Penalty, does not include restitution, reimbursement, or compensatory damages. Proceeding includes an investigation.

- (b) Except as otherwise described in this section, costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, or costs incurred in connection with any criminal, civil or administrative proceeding by the Federal Government, or a State, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with a Federal, State, local or foreign statute or regulation by the Contractor, and results in any of the following dispositions:

- (1) In a criminal proceeding, conviction.
- (2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of Contractor liability.

- (3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty.
 - (4) A final decision by an appropriate Federal official to debar or suspend the Contractor, to rescind or void a contract, or to terminate a contract for default by reason of a violation of or failure to comply with a law or regulation.
 - (5) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in paragraphs (b)(1), (2), (3) or (4) of this section.
 - (6) Not covered by paragraphs (b)(1) through (5) of this section, but where the underlying alleged Contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this section.
- (c) (1) If a proceeding referred to in paragraph (b) of this section is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by the Contractor and the Federal Government, then the costs incurred by the Contractor in connection with such proceeding that are otherwise unallowable under paragraph (b) of this section may be allowed to the extent specifically provided in such agreement.
- (2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the Contracting Officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.
- (d) If a proceeding referred to in paragraph (b) of this section is commenced by a State, local or foreign government, the Contracting Officer may allow the costs incurred in such proceeding, provided the Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the Contracting Officer.
- (e) Costs incurred in connection with a proceeding described in paragraph (b) of this section, but which are not made unallowable by that paragraph, may be allowed by the Contracting Officer only to the extent that:

- (1) The total costs incurred are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;
 - (2) Payment of the costs incurred, as allowable and allocable contract costs, is not prohibited by any other provision(s) of this contract;
 - (3) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and
 - (4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to the 80 percent limit) shall not exceed the percentage determined by the Contracting Officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. The amount of reimbursement allowed for legal costs in connection with any proceeding described in subparagraph (c)(2) shall be the amount determined to be reasonable by the Contracting Officer but shall not exceed 80 percent of otherwise allowable costs incurred. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.
- (f) Contractor costs incurred in connection with the defense of suits brought by employees or ex-employees of the Contractor under section 2 of the Major Fraud Act of 1988, including the cost of all relief necessary to make such employee whole, where the Contractor was found liable or settled, are unallowable.
- (g) Costs which may be unallowable under this clause, including directly associated costs, shall be differentiated and accounted for by the Contractor so as to be separately identifiable. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the Contracting Officer shall generally withhold payment and not authorize the use of funds advanced under the contract for the payment of such costs. However, the Contracting Officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the Contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

I-47. 970.5204-63 COLLECTIVE BARGAINING AGREEMENTS - MANAGEMENT AND OPERATING CONTRACTS (AUG 1993)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The Contractor shall include the substance of this clause in any subcontracts for protective services or other services performed on the DOE-owned site which will affect the continuity of operation of the facility.

I-48. 970.5204-74 OPTION TO EXTEND THE TERM OF THE CONTRACT (JUNE 1996)

- (a) The Department of Energy may unilaterally extend the term of this performance-based management contract by written notice to the Contractor within [Insert the period of time in which the Contracting Officer has to exercise the option]; provided, that the Department of Energy shall give the Contractor a preliminary written notice of its intent to extend at least twelve (12) months before the basic term of the contract expires. The preliminary notice does not commit the Department of Energy to an extension.
- (b) The option(s) to extend the contract is identified in Part I, Section B-1 of the contract. The Department of Energy may exercise any, or all, of the options identified in the contract. The total duration of this contract, including the exercise of any option(s) under this clause, shall not exceed 120 months.

I-49. 970.5204-75 PRE-EXISTING CONDITIONS (JUN 1997)

- (a) The Department of Energy agrees to reimburse the Contractor, and the Contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the Contractor arising out of any condition, act or failure to act which occurred before the Contractor assumed responsibility on (Specific date contract began). To the extent the acts or omissions of the

Contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to (Specific date contract began), the Contractor shall be responsible in accordance with the terms and conditions of this contract.

- (b) The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.

I-50. 970.5204-76 MAKE-OR-BUY PLAN (JUN 1997)

- (a) ***Definitions.***

Buy Item, means a work activity, supply, or service to be produced or performed by an outside source, including a subcontractor or an affiliate, subsidiary, or division of the Contractor.

Make Item, means a work activity, supply, or service to be produced or performed by the Contractor using its personnel and other resources at the Department of Energy facility or site.

Make-or-Buy Plan, means a Contractor's written program for the contract that identifies work efforts or requirements that either are "make items" or "buy items"

- (b) **Make-or-Buy Plan.** The Contractor shall develop and implement a make-or-buy plan that establishes a preference for providing supplies and services on a least-cost basis, subject to any specific make or buy criteria identified in the contract or otherwise provided by the contracting officer. In developing and implementing its make-or-buy plan, the Contractor agrees to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:
 - (1) The Contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.
 - (2) The Contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a Contractor shall communicate its plans, activities, cost-benefit analyses, and decisions to those stakeholders, including representatives of the community and local businesses, likely to be affected by such actions.
- (c) ***Submissions and Approval.*** For new contract awards, the Contractor shall submit an initial make-or-buy plan, for approval, within 180 days after contract award. If the existing contract is to be extended, the Contractor shall submit a make-or-buy plan for review and approval at least 90 days prior to the commencement of the

negotiations for the extension. The following documentation shall be prepared and submitted.

- (1) A description of each work item, and if appropriate, the identification of the associated Work Authorization or Work Breakdown Structure element;
 - (2) The categorization of each work item as "must make," "must buy," or "can make or buy," with the reasons for such categorization in consideration of the program specific make or buy criteria (including least cost considerations). For non-core capabilities categorized "must make," a cost/benefit analysis must be performed for each item if:
 - (i) The Contractor is not the least-cost performer, and
 - (ii) A program specific make-or-buy criterion does not otherwise justify a "must make" categorization;
 - (3) A decision to either "make" or "buy" in consideration of the program specific make or buy criteria (including least cost considerations) for work effort categorized as "can make or buy",
 - (4) Identification of potential suppliers and subcontractors, if known, and their location and size status;
 - (5) A recommendation to defer a make or buy decision where categorization of an identifiable work effort is impracticable at the time of initial development of the plan and a schedule for future re-evaluation;
 - (6) A description of the impact of a change in current practice of making or buying on the existing work force; and
 - (7) Any additional information appropriate to support and explain the plan.
- (d) Conduct of Operations. Once a make-or-buy plan is approved, the Contractor shall perform in accordance with the plan.
- (e) Changes to the Make-or-Buy plan. The make-or-buy plan established in accordance with paragraph (b) of this clause shall remain in effect for the term of the contract, unless:
- (1) A lesser period is provided either for the total plan or for individual items or work effort;
 - (2) The circumstances supporting the Make-or-Buy decisions change, or

- (3) New work is identified.

At least annually, the Contractor shall review its approved make-or-buy plan to ensure that it reflects current conditions. Changes to the approved make-or-buy plan shall be submitted in advance of the effective date of the proposed change in sufficient time to permit evaluation and review. Changes shall be submitted in accordance with the instructions provided by the contracting officer. Modification of the make-or-buy plan to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the Contracting Officer's written approval.

I-51. 970.5204-78 LAWS, REGULATIONS, AND DOE DIRECTIVES (JUN 1997)

- (a) In performing work under this contract, the Contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the Contractor to comply with such law or regulation pursuant to this paragraph.
- (b) In performing work under this contract, the Contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, identified in the Baseline List of Applicable Directives (List B) appended to this contract. Except as otherwise provided for in paragraph (c) of this clause, the Contracting Officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising List B, the Contracting Officer shall notify the Contractor in writing of the Department's intent to revise List B and provide the Contractor with the opportunity to assess the effect of the Contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the Contracting Officer's notice, the Contractor shall advise the Contracting Officer in writing of the potential impact of the Contractor's compliance with the revised list. Based on the information provided by the Contractor and any other information available, the Contracting Officer shall decide whether to revise List B and so advise the Contractor not later than 30 days prior to the effective date of the revision. The Contractor and the Contracting Officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of List B pursuant to the clause entitled, Changes, of this contract.

- (c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under 48 CFR (DEAR) 970.5204-2. When such a process is used, the set of tailored ES&H requirements, as approved by DOE pursuant to the process, shall be incorporated into the List B as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the Contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.
- (d) The Contractor is responsible for compliance with the requirements made applicable to this contract, regardless of the performer of the work. The Contractor is responsible for flowing down the necessary provisions to subcontracts at any tier to which the Contractor determines such requirements apply.

I-52. 970.5204-79 ACCESS TO AND OWNERSHIP OF RECORDS (JUN 1997)

- (a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the process of the work or, in any event, as the Contracting Officer shall direct upon completion or termination of the contract.
- (b) Contractor-owned records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) of this clause. [The Contracting Officer shall identify which of the following categories of records will be included in the clause.]
 - (1) Employment-related records (such as worker's compensation files; employee relations records, records of salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), except for those records described by the Contractor as being maintained in Privacy Act systems of records.

- (2) Confidential Contractor financial information, and correspondence between the Contractor and other segments of the Contractor located away from the DOE facility (i.e., the Contractor's corporate headquarters);
- (3) Records relating to any procurement action by the Contractor, except for records that under 48 CFR (DEAR) 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government; and
- (4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and
- (5) The following categories of records maintained pursuant to the technology transfer clause of this contract:
 - (i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.
 - (ii) The Contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.
 - (iii) Patent, copyright, mask work, and trademark application files and related Contractor invention disclosures, documents and correspondence, where the Contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.
- (c) *Contract Completion or Termination.* In the event of completion or termination of this contract, copies of any of the Contractor-owned records identified in paragraph (b) of this clause, upon request of the Government, shall be delivered to DOE or its designees, including successor Contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.
- (d) *Inspection, Copying, and Audit of Records.* All records acquired or generated by the Contractor under this contract in the possession of the Contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designee at all reasonable times, and the Contractor shall afford the Government or its designee reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the

Contracting Officer, the Contractor shall deliver such records to a location specified by the Contracting Officer for inspection, copying and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

- (e) *Applicability.* Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date or origination of such records.
- (f) *Records Retention Standards.* Special records retention standards, described at DOE Order 1324.5B, Records Management Program and DOE Records Schedules (version in effect on effective date of contract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the Contractor. In addition, the Contractor shall retain individual radiation exposure records generated in the performance of work under this contract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.
- (g) *Flow Down.* The Contractor shall include the requirements of this clause in all subcontracts that are of a cost-reimbursement type if any of the following factors is present:
 - (1) The value of the subcontract is greater than \$2 million (unless specifically waived by the Contracting Officer);
 - (2) The Contracting Officer determines that the subcontract is, or involves, a critical task related to the contract; or
 - (3) The subcontract includes 48 CFR (DEAR) 970.5204-2, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

I-53. 970.5204-80 OVERTIME MANAGEMENT (JUN 1997)

- (a) The Contractor shall maintain adequate internal controls to ensure that employees overtime is authorized only if cost effective and necessary to ensure performance of work under this contract.
- (b) The Contractor shall notify the Contracting Officer when in any given year it is likely that overtime usage as a percentage of payroll may exceed 4%.

- (c) The Contracting Officer may require the submission, for approval, of a formal annual overtime control plan whenever Contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4% or if the Contracting Officer otherwise deems overtime expenditures excessive. The plan shall include, a minimum:
- (1) An overtime premium fund (maximum dollar amount);
 - (2) Specific controls for casual overtime for non-exempt employees;
 - (3) Specific parameters for allowability of exempt overtime;
 - (4) An evaluation of alternatives to the use of overtime; and
 - (5) Submission of a semi-annual report that includes for exempt and non-exempt employees:
 - (i) Total cost of overtime;
 - (ii) Total cost of straight time;
 - (iii) Overtime cost as a percentage of straight-time cost;
 - (iv) Total overtime hours;
 - (v) Total straight-time hours; and
 - (vi) Overtime hours as a percentage of straight-time hours.

I-54. 970.5204-81 DIVERSITY PLAN (DEC 1997)

The Contractor shall submit a Diversity Plan to the Contracting Officer for approval within 90 days after the effective date of this contract. The Contractor shall submit an update to its Plan with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided at Attachment 9 to Section J of this contract. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, and (5) economic development (including technology transfer).

I-55. 952.227-11. PATENT RIGHTS-RETENTION BY THE CONTRACTOR (SHORT FORM) (FEB 1995) AND 970.5204-71 PATENT RIGHTS-NONPROFIT MANAGEMENT AND OPERATING CONTRACTORS (FEB 1995)

- (a) *Definitions.*
- (1) "*Invention*", means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States

Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

- (2) *"Made"* when used in relation to any invention, means the conception of first actual reduction to practice of such invention.
- (3) *"Nonprofit organization"*, means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
- (4) *"Practical Application"*, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.
- (5) *"Small Business Firm"*, means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.
- (6) *"Subject Invention"*, means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.
- (7) *"Agency Licensing Regulations"* and *"Agency Regulations concerning the licensing of Government-owned inventions"*, means the Department of Energy patent licensing regulations at 10 CFR Part 781.
- (8) *"Patent Counsel"*, means the Department of Energy (DOE) patent counsel assisting the DOE contracting activity.
- (9) *"Exceptional Circumstance Subject Invention"*, means any subject invention in a technical field or task determined by DOE to be subject to an exceptional circumstance under Section 35 U.S.C. 202 (a) (ii)

(b) *Allocation of Principal Rights.*

- (1) The Contractor may retain the entire right, title, and interest throughout the world to each subject invention except an exceptional circumstance subject invention subject to the provisions of this clause and 35 USC 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world. The right of the Contractor to elect title to subject inventions is subject to the invention rights disposition in the following identified treaties or international agreement. ***(Part III, Section J, Attachment 10).**
- (2) The DOE reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract and effectuate those license or other rights which are necessary for the Government to meet its obligations to foreign governments, their national, and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.
- (3) The Contractor agrees to assign to the Government, the entire right, title and interest thereto, throughout the world in and to any Exceptional Circumstance Subject Invention except to the extent that rights are retained by the Contractor through a greater rights determination. The Contractor or an employee-inventor may submit a request for greater rights at the time the invention is disclosed to DOE or within 8 months after conception or first actual reduction to practice, whichever occurs first. At this time, the technical fields determined by DOE to be exceptional circumstances are uranium enrichment technology, the storage and disposal of civilian high-level nuclear waste and spent fuel technology, and those national security technologies which are classified, or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168). DOE has also made a determination of Exceptional Circumstances for DOE Funding Agreements relating to the;
 - (i) U.S. Department of Energy Steel Initiative and Metals Initiative,
 - (ii) the Advanced Battery Consortium Program, and
 - (iii) any funding agreements, or subcontracts thereunder, which are funded in part by the Electric power Research Institute (EPRI) or the Gas Research Institute (GRI). DOE reserves the right to

unilaterally amend this contract to identify and new technical fields which may be determined to be exceptional circumstances pursuant to 35 U.S.C. 202 (a)(ii) with respect to subject inventions made after the date of the amendment.

(c) *Invention Disclosure, Election of Title, and Filing of Patent Application by Contractor.*

- (1) The Contractor will disclose each subject invention to the Department of Energy (DOE) within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the DOE, the Contractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information regarding an exceptional circumstance subject invention or a subject invention related to a treaty or international agreement.
- (2) The Contractor will elect in writing whether or not to retain title to any such invention by notifying DOE within 2 years of disclosure to DOE. However, in any case where publication, on sale or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.
- (3) The Contractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to

file foreign patent applications where such filing has been prohibited by a Secrecy Order.

- (4) Requests for extension of the time for disclosure, election, and filing under subparagraphs (c)(1), (2), and (3) of this clause may, at the discretion of the agency, be granted.
- (d) *Conditions when the Government may obtain title. The Contractor will convey to the Federal agency, upon written request, title to any subject invention--*
- (1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Contractor to disclose or elect within the specified times.
 - (2) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country.
 - (3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.
- (e) *Minimum Rights to Contractor and Protection of the Contractor Right to File.*
- (1) The Contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. When DOE approves such reservation, the Contractor's license will extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.
 - (2) The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject

invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

- (3) Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR Part 404 and agency regulations concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

(f) *Contractor action to Protect the Government's Interest.*

- (1) The Contractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to
 - (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and
 - (ii) convey title to DOE when requested under paragraph (d) of this clause and to enable the government to obtain patent protection throughout the world in that subject invention.
- (2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational

programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

- (3) The Contractor will notify DOE of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office. (4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention."
- (4) Where the Contractor has elected to retain title, the Contractor agrees that the Government may duplicate and disclose subject Invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause provided, however, that any such disclosure of a subject invention is subject to 35 U.S.C. 205.
- (5) The Contractor shall establish and maintain active an effective procedures to ensure that subject inventions are promptly identified and timely disclosed and shall submit a description of the procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

(g) *Subcontracts.*

- (1) Unless otherwise authorized or directed by the Contracting Officer, the Contractor will include the clause set forth in 48 CFR 952.227-11 suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or domestic nonprofit organization except subcontracts which are subject to exceptional circumstance. (Note: The DOE has declared exceptional circumstances as indicated in paragraph (b) (3) of this clause). The Subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, as part of the consideration for awarding any subcontract, obtain rights in the Subcontractors subject inventions.
- (2) The Contractor will include in all other subcontracts regardless of tier, for experimental, evelopmental, or research work the patent rights clause required by 48 CFR 952.227-13, suitably modified to identify the parties or

such clause as modified for such subcontracts which are subject to an exceptional circumstance.

- (3) In the case of subcontracts, at any tier, DOE, Subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the Subcontractor and DOE with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.
- (h) *Reporting on Utilization of Subject Inventions.* The Contractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received, by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.
- (i) *Preference for United States Industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.
- (j) *March-in Rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that--

- (1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
 - (2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;
 - (3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or
 - (4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.
- (k) *Special Provisions for Contracts with Nonprofit Organizations.* If the Contractor is a nonprofit organization, it agrees that--
- (1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Contractor;
 - (2) The Contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;
 - (3) The balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and
 - (4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the

capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(4).

(l) *Communications.*

- (1) The Contractor shall direct any notification, disclosure, or request to DOE provided for in this clause to the DOE patent counsel assisting the DOE contracting activity, with a copy of the communication to the Contracting Officer.
- (2) Each exercise of discretion or decision provided for in this clause, except subparagraph (k)(4), is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.
- (3) Upon request of the DOE Patent Counsel or the Contracting Officer, the Contractor shall provide any or all of the following:
 - (i) a copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the Contractor has applied for a patent;
 - (ii) a report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or
 - (iii) a report, prior to closeout of the contract, listing all subject inventions or stating that there were none.

(m) *Transfer to Successor Contractor.*

- (1) In the event of termination or expiration of this contract, the Contractor shall transfer any unexpended balance of income received relating to intellectual property, in accordance with instructions from the Contracting Officer, to a successor Contractor, or in the absence of a successor Contractor, to such other entity as designated by the Contracting Officer. The contractor shall also transfer title, as one package, in all patents and patent applications, license agreements, accounts containing royalty

revenues from such license agreements, including equity positions in third-party entities, and other intellectual property that arose under the performance of this contract, to the successor Contractor or to the Government, as directed by the Contracting Officer.

- (2) The Government agrees that the recipient of such title shall assume any remaining obligations and liabilities in connection with the patents and patent applications.
- (n) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility
 - (1) to practice or have practiced by or for the Government at the facility, and
 - (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of these rights shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.
- (o) *Atomic Energy.*
 - (1) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the Contractor or its employees with respect to any invention or discovery made or conceived in the course of or under this contract.
 - (2) Except as otherwise authorized in writing by the Contracting Officer, the Contractor will obtain patent agreements to effectuate the provisions of paragraph (m)(1) of this article from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.
- (p) *Patent Functions.*

The Contractor upon written request of the Contracting Officer or Patent Counsel will use reasonable efforts to support the Patent Counsel in carrying out patent-related functions for work arising out of the contract, which functions include but

are not limited to prosecution of patent applications where the Government obtains title, determination of questions of novelty, patentability, prior art searches and inventorship.

(q) *Educational Awards Subject to 35 U.S.C. 212.*

The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology related to Exceptional Circumstance technology, or who is subject to treaties or international agreements as set forth in the Article entitled, "Patent Rights: paragraph (b) (1) (2) and (3) of this contract or agreements other than funding agreements. The Contracting Officer shall have the right to disapprove such placement.

(r) *Annual Appraisal.*

There shall be an annual appraisal done by Patent counsel. The appraisal shall evaluate the Contractor's effectiveness in identifying and protecting intellectual property developed at the facility in accordance with DOE policy.

(s) *Examination of Records.*

The Contracting Officer or his authorized representative, until the expiration of three years after final payment under this contract, shall have the right to examine any books (including laboratory notebooks), records, documents, and other supporting data of the Contractor which the Contracting Officer or his authorized representative reasonably deem pertinent to the discovery or identification of Exceptional Circumstance Subject Inventions or to determine compliance with the requirements of this clause.